No. 87-1684

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

ESTATE OF RAY LAMAR WESSON, M.D., DECEASED, BY EMOGENE HALL, ADMINISTRATRIX AND AS GUARDIAN OF RAY LAMAR WESSON, JR., ALLISON LYNN WESSON, DAVE NEWTON WESSON and JASON MANNING WESSON, MINORS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case presents the unresolved questions of the propriety of the Mississippi Supreme Court's failure to apply preemptive federal legislation and to pass upon federal constitutional defenses in reliance upon irregularly applied state procedural rules.

STATEMENT OF THE CASE

Respondent, in its Statement of the Case, has ignored two critical facts. First, MONY has admitted that it coded Dr. Wesson's policy so that it would not have an

operative Automatic Premium Loan provision ("APL"). The coding, however, was done to benefit Dr. Wesson and his partner to preserve the tax-qualified status of the policy. App. at 71a. MONY's personnel relied on Endorsement No. 64540 to the policy to negate the operation of the APL, and they advised Dr. Wesson's agent that no APL was provided. App. at 5a. MONY's conduct, therefore, was consistent with its policies and procedures and with the desire to preserve the tax-qualified status of the policy. App. at 4a.

Second, prior to the commencement of the lawsuit MONY's claims personnel were not aware that the APL was operative as they relied on computer records showing no APL. The Mississippi Supreme Court recognized that Dr. Wesson and his partner had in 1978 and 1979 obtained loans to cure prior defaults in premium payments and did not rely upon the APL at that time. App. at 8a, n. 2. Absent from the Mississippi Supreme Court's opinion is any reference to Respondent demanding payment in reliance upon the APL. No reference exists, as Respondent never made a demand under the APL, opting to sue instead. After the lawsuit was commenced, MONY (not Respondent) determined that the APL applied and immediately tendered payment. App. at 9a.

SUMMARY OF ARGUMENT

Substantial issues of federal law are presented for this Court's review. MONY did not waive its right to assert the ERISA preemption defense, as the defense is not simply an affirmative defense which can be waived by failure to plead in a trial court (Point I).

On May 16, 1988, this Court decided *Bankers Life & Casualty Co. v. Crenshaw*, 56 U.S.L.W. 4418 (U.S. May 16, 1988). This Court held that it was inappropriate to rule on the constitutionality of the award of punitive damages, where appellant had failed properly to raise the defense in the state court. In this case, MONY

specifically raised its Excessive Fines Clause challenge (U.S. Const. amend. VIII) to the award of punitive damages by a motion to amend the assignment of errors on November 13, 1986. App. at 116a. Accordingly, this Court is presented with a proper record for consideration of the constitutionality of the punitive damage award (Point II).

I. MONY TIMELY RAISED ITS ERISA PREEMPTION DEFENSE AS ESTABLISHED BY *PILOT LIFE*

Respondent attempts to label MONY's presentation of the ERISA preemption defense as untimely. Respondent treats the ERISA preemption defense as a simple affirmative defense, which is waived unless asserted in the trial court. Respondent argues that this Court's decision in *Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. 1549 (1987), was a result that could have been anticipated by MONY and that the very arguments made by *Pilot Life* should have been made by MONY.

The issue whether state law "bad faith" claims for punitive damages are preempted by ERISA was not resolved until the holding of *Pilot Life*. As Justices Brennan and Marshall stated in a concurring opinion in a case decided the same day as *Pilot Life*, "before today's decision in *Pilot Life*, the answer to the question whether ERISA preempted state claims of the sort at issue here was not obvious." *Metropolitan Life Ins. Co. v. Taylor*, 107 S. Ct. 1542, 1548 n. (1987). Given the sweeping nature of the ERISA legislation, and the lack of a dispositive interpretation of the preemption issue prior to *Pilot Life*, MONY cannot be held to have waived the defense.

Subsequent to the Court's decision in *Pilot Life*, MONY timely brought this interpretation of the governing law to the attention of the Mississippi Supreme Court. As the case below had already been argued and submitted, MONY was constrained to advise the court by letter

brief. The court's refusal to consider MONY's preemption defense based upon *Pilot Life*, as described in a footnote to the court's opinion, can fairly be read to have been supported, at least in part, on the fortuitous fact that *Pilot Life* was decided after this case was submitted.

To hold that ERISA preemption, as established by *Pilot Life*, constitutes a waivable affirmative defense ignores the "extraordinary" application of ERISA § 502(a), 29 U.S.C. § 1132(a) (1982). In *Metropolitan Life Insurance Co. v. Taylor*, 107 S. Ct. 1542 (1987), this Court held that state court actions based upon claims preempted by ERISA and involving § 502(a) are removable to federal court under federal question jurisdiction. The Court found in the legislative history of ERISA a clear intent by Congress to single out for special treatment claims preempted by ERISA under § 502(a). *Id.* at 1547. The preemptive force of ERISA in such cases was held to be extraordinarily powerful so as actually to convert state common law claims into purely federal questions. *Id.*

ERISA preemption claims must be treated as far more than affirmative defenses. Mere affirmative defenses may be considered waived by the operation of procedural rules governing the time within which they must be asserted. Such a result occurred in *Dueringer v. General American Life Insurance Co.*, 842 F.2d 127 (5th Cir. 1988), and is inconsistent with this Court's treatment of the ERISA preemption doctrine in *Taylor*. Where a rule of law, however, establishes that certain claims are purely and exclusively federal in character, state rules cannot operate to vitiate such defenses as the states no longer have the power to apply state law in such cases. MONY had an absolute right to have its preemption claim considered and issues in the case decided in accordance with ERISA.

II. THE REFUSAL OF THE MISSISSIPPI SUPREME COURT TO ENTERTAIN MONY'S EXCESSIVE FINES CLAUSE ARGUMENT RESTED UPON A PROCEDURAL RULE THAT IT APPLIES ONLY IRREGULARLY

Since the Petition was filed in this action, the Court decided *Bankers Life and Casualty Co. v. Crenshaw*, 56 U.S.L.W. 4418 (U.S. May 16, 1988). In *Crenshaw* the Court held that a federal question is not properly presented to the highest court of a state on a motion for rehearing where it consists merely of a "vague appeal to constitutional principles." *Id.* at 4420. The Court reaffirmed its holding in *Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982), in which it accepted certiorari jurisdiction of claims that were raised for the first time, but not passed upon, in the Mississippi Supreme Court on petition for rehearing, but held in *Crenshaw* that *Hathorn* was inapposite because appellant had not adequately raised its claims on rehearing. *Id.* The principles enunciated in *Hathorn* and *Crenshaw* establish that the Court has jurisdiction pursuant to 28 U.S.C. § 1257(3) (1966) over MONY's claim that the punitive damage award violated the Eighth Amendment's proscription against excessive fines.

In its motion to amend its assignment of errors to the Mississippi Supreme Court, MONY asserted that:

> The jury's award of punitive damages of $8,000,000 violates the Excessive Fines Clause of the Eighth Amendment to the Constitution of the United States and the Excessive Fines Clause of Section 28 of the Mississippi Constitution of 1890.
>
> Further, the Appellant seeks leave to present arguments (in a supplement to its Brief, not to exceed two pages) to this Court in support of this additional assignment of error.

App. at 117a. There is, therefore, no doubt from the record that "a claim under a Federal statute or the

Federal Constitution was presented in the state court[]." *Bankers Life & Casualty Co. v. Crenshaw*, 56 U.S.L.W. at 4420, quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981). MONY's motion was denied at oral argument on the ground that it did not present its Excessive Fines Clause challenge to the trial court.

The issue before the Court, therefore, is whether the refusal of the Mississippi Supreme Court to pass upon the Excessive Fines Clause challenge is an adequate and independent state ground barring review in this Court. Where the procedural rule that precluded consideration of the federal question below is not "strictly or regularly" followed, there is no adequate and independent state ground barring review. *Hathorn v. Lovorn*, 457 U.S. at 262-63 (1982).[1]

In *Crenshaw*, the appellant raised its federal constitutional challenges for the first time in a motion for rehearing before the Mississippi Supreme Court. This Court noted that if the federal constitutional challenges had been adequately stated, *Hathorn* would have controlled and presumably the Court would have granted certiorari to review the questions presented. *Bankers Life & Casualty Co. v. Crenshaw*, 56 U.S.L.W. at 4420. MONY's specific presentation of the federal constitutional question to the Mississippi Supreme Court by moving to amend its assignment of errors prior to submission of the appeal satisfies the deficiency the Court found in *Crenshaw*.[2] *Hathorn* controls as this action also in-

[1] Respondent fails to distinguish or otherwise address *Hathorn* and instead, relies on cases involving the timely assertion of federal issues in jurisdictions other than Mississippi. (*Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983) (Alabama Supreme Court); *Allstate Ins. Co. v. Hawkins*, 108 S. Ct. 212 (1987) (Arizona Supreme Court).

[2] If MONY had raised the Excessive Fines Clause challenge for the first time in a motion for a rehearing the Court undoubtedly would have jurisdiction to review the federal question. *Bankers*

volves the Mississippi court's practice of irregularly denying parties leave to raise issues for the first time on appeal. The Mississippi court's failure to decide the federal issue by invoking a procedural rule that it does not apply evenhandedly does not constitute an adequate and independent state ground barring this Court's jurisdiction. *Hathorn v. Lovorn*, 457 U.S. at 263.

CONCLUSION

For the foregoing reasons, as well as the grounds advanced in the Petition and by the *amicus curiae*, a Writ of Certiorari should issue to review the opinion of the Mississippi Supreme Court.

Respectfully submitted,

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Life & Casualty Co. v. Crenshaw, 56 U.S.L.W. at 4420. The Mississippi Supreme Court, nevertheless, undoubtedly would not have passed upon the federal question for the same reason it did not allow MONY leave to raise the challenge by amending its assignment of errors.